
(2011) 09 AHC CK 0054

In the Allahabad High Court

Case No : Civil Miscellaneous Writ Petition No. 34178 of 2007

Dr. Tauqir Ahmad Khan and Others

APPELLANT

Vs

Nagar Palika Parishad, Hasanpur, J.P. Nagar and Another

RESPONDENT

Date of Decision : 29-09-2011

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 1 Rule 10, Order 21 Rule 100, Order 21 Rule 101, Order 21 Rule 103, Order 21 Rule 35

Citation : (2012) 1 ADJ 715 : (2012) 2 AWC 1427

Hon'ble Judges : Sunil Hali, J

Bench : Single Bench

Final Decision : Allowed

Judgement

Hon"ble Sunil Hali, J.—A civil suit No. 164 of 2000 was filed before the Civil Court seeking decree of mandatory injunction thereby directing the respondents not to make any obstruction in the plaintiffs user of land and not to raise any constructions over the land/Plot No. 367/3 belonging to the plaintiffs. By way of an interim measure, vide order dated 31.5.2000, a direction was issued to the defendants to remove the additional and illegal constructions raised by the defendants and not to raise any further constructions or encroachment upon the plaintiffs land. During the pendency of the suit an application for impleadment of tenants of Nagar Palika Parishad as defendant Nos. 3 to 10 was filed. It seems that the application was not pursued as a result of which same was dismissed as not pressed on 11.2.2003 by the trial Court. This order was not questioned by the tenants before the Higher Court.

2. Trial Court vide, its order dated 4.9.2003 decreed the suit of the plaintiffs by directing demolition of ten shops constructed on the land belonging to the plaintiffs-petitioners. The said decree was challenged before the first appellate Court without any success by the defendants. Second Appeal was filed before this Court and the same stood dismissed by its order dated 29.7.2005 as such the decree passed in Suit No. 164 of 2000 had attain finality. An execution

application was filed by the petitioner before the executing Court which was numbered as Execution Petition No. 13 of 2005. The judgment debtor appeared before the Trial Court and sought time to comply with the decree. An application bearing No. 24 C was filed by the judgment debtor on 26.9.2006 and 30.6.2006 praying therein that the property in question was in possession of the tenants to whom notices have been sent by him for evicting the premises. The decree cannot be implemented unless the tenants are evicted from the premises. Executing Court rejected the plea of the judgment debtor on the ground that the tenants have already filed an application for impleadment but did not pursue the same as a result of which the said application was dismissed. He was directed to have the decree implemented within a period of twenty days. This order was questioned before the Revisional Court who vide its order dated 13.5.2007 allowed the revision petition and directed that the applicants (tenants) be heard in the execution petition filed by the judgment holder. It is this order which is subject matter of challenge before this Court in the instant writ petition.

3. Heard learned counsel for the parties and perused the material on record.

4. Facts in the case are not in dispute that the decree passed in Civil Suit No. 164 of 2000 had attained finality. Directions issued in the suit are that the constructions of the shops raised by the Nagar Palika Parishad are required to be demolished in order to remove the encroachment made on the land belonging to the petitioners. For seeking enforcement of the decree, execution application was filed before the Executing Court. It is before the Executing Court an application was filed by the appellants that the decree cannot be implemented as the tenants are in possession over the property and have an independent right to remain in possession of the property.

5. Section 47 of the CPC 1908 (hereinafter referred to as CPC) envisages that all questions arising between the parties to the suit in which the decree was passed relating to the execution, discharge or satisfaction of the decree shall be determined by the Court executing the decree and not by a separate suit so that the issues which are required to be determined by the Civil Court must relate to the execution and discharge of the decree and not for the purpose of redetermination of any rights in the said decree. It also envisages that all questions relating to delivery of possession of such property and any issue relating to execution, discharge or satisfaction of the decree is to be determined by the executing Court. A decree which attains finality cannot be redetermined by a executing Court. One of the issue that is required to be determined by the Executing Court is the right of a person other than the judgment debtor who claims to be in possession of the property. Right of a person who resist the execution of the decree must have a right which should be independent of the right determined in the decree.

6. Order XXI Rule 97 contemplates that the resistance shown by a person in execution of decree who is in possession of the property that his right has to be determined which should be independent of the right determined in the decree.

In such a situation where such resistance is shown decree holder has right to make an application to the executing Court complaining all such resistance or obstruction. On an application being filed executing Court is required to proceed to adjudicate the case in accordance with law. In such an application, Executing Court is to determine the right of a person claiming a right independent of the decree.

7. Order XXI Rule 99 conceives of resistance or obstruction to the possession of immovable property when made in execution of a decree by "any person". This may be either by the person bound by the decree, claiming title through judgment debtor or claiming independent right of his own including tenant not party to the suit or even a stranger. A decree holder, in such a case, may make an application to the Executing Court complaining such resistance, for delivery of possession of the property. Sub-clause (2) after 1976 substitution empowers the Executing Courts when such claim is made to proceed to adjudicate upon the applicants claim in accordance with provisions contained hereinafter. This refers to Order 21, Rule 101 (As amended by 1976 Act) under which all questions relating to right, title or interest in the property arising between the parties under Order 21, Rule 97 or Rule 99 shall be determined by the Court and not by a separate suit. By the amendment, one has not to go for a fresh suit but all matter pertaining to that property even if obstructed by a stranger is adjudicated and finality decided by the executing proceedings. The expression "any person" under sub-clause (1) is used deliberately for widening the scope of power so that the Executing Court could adjudicate the claim made in any such application under Order 21, Rule 97. Thus by the use of the words "any person" it includes all persons resisting the delivery of possession, claiming right in the property even those not bound by the decree, including tenants or other persons claiming right on their own including a stranger. So, under order 21, Rule 101 all disputes between the decree-holder and any such person is to be adjudicated by the Executing Court. A party is not thrown out to relegate itself to the long drawn out arduous procedure of a fresh suit. This is to salvage the possible hardship both to the decree-holder and other person claiming title on their own right to get it adjudicated in the very execution proceedings.

8. Order 21, Rule 35 deals with cases of delivery of possession of an immovable property to the decree-holder by delivery of actual physical, possession and by removing any person in possession who is bound by a decree, while under Order 21, Rule 36 only symbolic possession is given where tenant is in actual possession. Order 21, Rule 97 as aforesaid, conceives of cases where delivery of possession to decree-holder or purchaser is resisted by any person. "Any person", as aforesaid, is wide enough to include even a person not bound by a decree or claiming right in the property on his own including that of a tenant including stranger. What is the right which is required to be determined in such a proceedings? Would it be proper for the executing Court to re-open the issue which stands concluded by the decree which is subject matter of execution. This is an issue which is required to be determined in the present case.

9. Tenants claim to be in possession of the property leased out to them by Nagar Palika. They have right to remain in possession on the basis of rent deed executed by them with the owner of the property. Their privity of contract is with the land lord. Once the Court determines that the title of the landlord was imperfect as he had encroached upon the land of the petitioners would the tenant claim any independent right to remain in possession in this behalf. Executing Court in such a situation would have to examine as to whether the tenant has independent right to remain in occupation of the property when it is found that the said property is owned by the decree holder and not by the Nagar Palika.

10. Once the executing Court embarks upon the said execution to determine the right of a person claiming to be in possession of the property impliedly such an enquiry/adjudication is in effect as to whether such a person has an independent right to enforce against the judgment holder. Any determination in this behalf should not have the affect of re-determination of right in the proceedings which stands already concluded. Such a person must show to the Court that he has some jural relationship with the decree holder independent of the right claimed by the judgment debtor. If a person claims to be a tenant then his right to remain in possession will always be determined by the fact that the landlord had title to the property leased out to him. A tenant has no independent right to enforce the same against the decree holder. Once the title of the landlord stands determined by the Court his right to remain in possession is protected by the statute only vis-a-vis the landlord. Once it is found that the landlord did not have title to the property he cannot claim any independent right to remain in possession vis-a-vis decree holder. His right flows from the jural relationship with the erstwhile landlord. Tenants have right not to be evicted otherwise than in due course of law only vis-avis the landlord. Once it is found that the landlord has imperfect title to the property, it cannot be enforced against the petitioners who have been found to be owner of the property by the Court as the defendants have no juror relationship with the petitioners. It is also observed in this case that the tenants have filed an application under Order 1 Rule 10 for impleading as party but they did not pursue the said remedy and allowed it to be dismissed for non prosecution. Efforts on the part of the tenants is not to scuttle the execution of the decree by raising an issue that they were tenants of the Nagar Palika as a consequence have a right to remain in possession of the property. They have ample opportunity of pursuing their matter in the suit where they can establish their right to remain in possession of the property which they have failed to do. As stated herein above, that they have no juror relationship with the present petitioners who is seeking enforcement of his decree by asking demolition of the construction raised on the land owned and possessed by the decree holder, in such a situation, Executing Court was right in its approach by holding that reopening of the issue in order to determine the right of the tenants would in affect be going behind the decree. Revisional Court while allowing the revision petition of the tenants discussed the issue which stood already

determined by the Courts. Finding of the Revisional Court that the tenants have not been heard in their application seeking impleadment was beyond the scope of the jurisdiction of the said Court.

11. An inquiry or investigation into the right of the tenants or the person in possession can arise only if during process of execution of decree obstruction is raised by such person and the matter is brought to the notice of the executing Court by the decree holder. When such matter is brought to the notice of the decree holder right of the tenants or the person in possession is required to be adjudicated by the said Court.

12. A third party has no locus standi to seek investigation into its claim unless proper proceedings are initiated under Order 21 Rule 97 and 99. A plain reading of Order 21, Rules 98, 99, 100 and 103 makes it clear that no application for adjudication of the right, title and interest of an objector would lie before he is dispossessed in execution of a decree to which he is not a party. If, however, he is dispossessed, he is given a remedy under Order 21, Rule 99 to apply for restoration of possession to the execution Court. The executing Court on such application is required to adjudicate the question of right, title and interest of the dispossessed objector and pass appropriate orders under Rule 100. No application under Order 21, Rule 97 would lie at the instance of an objector in anticipation of his dispossession in execution of a decree for eviction to which he was not a party.

13. The controversy in the present case relates to the inability of the judgment debtor to implement the decree of Court in view of the fact that the tenants are in possession of the property. No application has been moved by the tenants seeking determination of their right which are required to be adjudicated under Order XXI Rules 97 and 99. Revisional Court vide its order had directed that the tenants be heard in the matter before an order of eviction is required to be passed.

14. Present issue has been raised by the judgment debtor and there are no proceedings pending in terms of the order XXI Rules 97 and 99. A person who claims to be in possession of the property has not come up before the Executing Court seeking determination of their right independent of the decree. As and when any such proceedings are initiated in this behalf Executing Court will consider the said application keeping in view the observation made herein above. Intervention by the judgment debtor by filing an application to the Executing Court that the tenants are in possession of the property would not protect the tenants until appropriate proceeding in this behalf is filed by them. There is no such application filed by the tenants before the executing Court. The direction issued by the Revisional Court in this behalf is uncalled for.

15. In the result, the writ petition is allowed. The order dated 13.5.2007 impugned in this writ petition is hereby quashed. Executing Court is directed to proceed with the execution of the decree.